Nationsway Transport Service *and* Gregory Noweski

Local 560, International Brotherhood of Teamsters, AFL–CIO *and* Gregory Noweski. Cases 22–CA–20363 and 22–CB–7933

March 24, 1999

DECISION AND ORDER

BY MEMBERS LIEBMAN, HURTGEN, AND BRAME

On May 30, 1997, Administrative Law Judge Steven Davis issued the attached decision. The Respondent Employer (the Employer) and the Respondent Union (the Union) each filed exceptions and supporting briefs, and the General Counsel filed a reply to the Employer's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order, as modified and set forth in full below.[2]

1. The Employer has excepted to, inter alia, the judge's failure to defer to the parties' September 9, 1994[3] settlement of Charging Party Gregory Noweski's July 13 grievance over the Employer's failure to credit and pay him for work performed on June 3 and 15. The Employer relies on *Postal Service*, 300 NLRB 196 (1990), and *Alpha Beta Co.*, 273 NLRB 1546 (1985), petition for review denied sub nom. *Mahon v. NLRB*, 808 F.2d 1342 (9th Cir. 1987). We find no merit in this exception.

As set forth in *Postal Service*, 300 NLRB at 198, one of the criteria for Board deferral to a grievance settlement agreement is that the contractual issue in the grievance be factually parallel to the unfair labor practice issue in the Board proceeding. As discussed below, this criterion is not met here.

The contractual issue in Noweski's July 13 grievance was whether the Employer violated article 49, pay period, by not paying him for the 2 days in question. The September 9 settlement of this grievance provided Noweski with pay for 1 day (June 3). Crediting him with that additional day gave him the 30 total working days that he needed to complete his probationary period and resulted in his obtaining seniority status and returning to work on September 12. The unfair labor practice issues in this case, on the other hand, are: (a) whether the Union violated Section 8(b)(1)(A) and (2) of the Act by causing the Employer to discharge Noweski on June 27 in violation of Section 8(a)(3) and (1) of the Act; (b) whether the Employer violated Section 8(a)(3) and (1) by discharging Noweski (more precisely, no longer assigning him work); (c) whether the Union violated Section 8(b)(1)(A) and (2) by causing the Employer not to place Noweski at the top of the seniority list in violation of Section 8(a)(3) and (1); and (d) whether the Employer violated Section 8(a)(3) and (1) by not placing Noweski at the top of the seniority list. Thus, the grievance settlement resolved only Noweski's claim to 2 days' pay and did not parallel or encompass the unfair labor practice issues of whether he was unlawfully deprived of work between June 27 and September 9, and whether he was unlawfully deprived of placement at the top of the seniority list.

Nor does the record support the Employer's contention that Noweski agreed, in connection with the grievance settlement, to reinstatement without backpay and to be placed in the number two position on the seniority list. To the contrary, the record shows that the backpay and seniority issues arose subsequent to the September 9 settlement. Thus, on September 12, when Noweski returned to work, a question was raised as to where he belonged on the seniority list. At that time, the Employer sought guidance from the Union, which advised that Noweski should be placed in the number 2 position. Accordingly, on September 12, the Employer published a new seniority list with Noweski occupying the second position. Two days later, Noweski filed two more grievances, (a) seeking backpay for the approximately 11-week period between June 24 and September 9, when he was not working, and (b) seeking placement in the number one position on the seniority list. The Union thereafter processed both of these grievances through arbitration, with the Employer making the procedural argument that the backpay grievance was barred by the September 9 settlement of Noweski's July 13 grievance. The grievance committee rejected the Employer's procedural contention and denied both of Noweski's grievances on the merits.

Accordingly, for all these reasons, we find that the contractual issue resolved by the grievance settlement is not factually parallel to the unfair labor practice issues

[1] The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We also find without merit the Union's allegations of bias and prejudice on the part of the judge. On our full consideration of the record, we find no evidence that the judge prejudged the case, made prejudicial rulings, or demonstrated bias in his credibility resolutions, analysis, or discussion of the evidence.

[2] We have modified the judge's recommended Order (1) to conform to *Indian Hills Care Center*, 321 NLRB 144 (1996), and *Excel Container, Inc.*, 325 NLRB 17 (1997); (2) to delete "interfering with" from par. B1(c); (3) to include in pars A2(c) and B2(a) the statement that the Union's liability for backpay shall terminate 5 days after it notifies the Employer that it has no objection to the employment of Noweski; and (4) to require the reciprocal posting of notices. See *North Carolina Shipping Assn.*, 326 NLRB 280, fn. 1 (1998).

[3] All dates are 1994 unless otherwise stated.

raised by the complaint and that, therefore, deferral to the settlement is not warranted under *Postal Service*.

2. The judge concluded, inter alia, that the Employer violated Section 8(a)(3) and (1) of the Act by terminating Noweski on June 27. More specifically, the judge found that the Employer ceased assigning Noweski work from that date on in response to the Union's June 24 unlawful request that the Employer terminate Noweski because he had frustrated the Union's plan to have another employee, Raymond Doyle, be the first employee to sign in on the first day of operation of the Employer's Parsippany, New Jersey terminal. Under the Union's plan, Doyle, rather than Noweski, would have been entitled to act as the Union's "spokesman" on the job, performing the duties normally performed by a shop steward. In reaching this conclusion, the judge applied the framework for analysis set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). He found that Noweski's union activities were a motivating factor in the Employer's decision to terminate Noweski, and that the Employer failed to establish that it would have terminated Noweski in the absence of his union activities.

The Employer excepts to this conclusion on the grounds, inter alia, that the judge erred *(a)* by applying the *Wright Line* framework for analysis and *(b)* by characterizing Noweski's conduct as "union activities." We find no merit in the Employer's arguments. The consolidated complaint alleges, in pertinent part, that the Employer terminated Noweski pursuant to the Union's request that it do so (complaint paras. 8 and 9), and that in so terminating Noweski the Employer discriminated in regard to the hire or tenure or terms and conditions of employment of its employees, thereby encouraging membership in a labor organization, in violation of Section 8(a)(1) and (3) of the Act (complaint para. 15). Application of the *Wright Line* framework for analysis is entirely appropriate, where, as here, the Employer's motive is at issue. See *Wright Line*, supra, 251 NLRB at 1089. While Noweski's conduct was not in support of the Union, and thus was not classic "union activities," his signing in first and his resultant top seniority were clearly opposed by the Union. E.g., *Wenner Ford Tractor Rentals, Inc.*, 315 NLRB 964 (1994) (*Wright Line* applied; discriminatee's conduct in question was his opposition to union officials in an internal union election); *Avon Roofing & Sheet Metal Co.*, 312 NLRB 499, 503 (1993) (*Wright Line* applied; discriminatees' conduct in question was their dissident internal union activities); *Combustion Engineering*, 272 NLRB 957, 966 fn. 6 (1984) (*Wright Line* applied; discriminatee's conduct in question was his acrimonious challenge to and disagreement with the union business manager's interpretation and application of the collective-bargaining agreement).

3. Contrary to our dissenting colleague, we agree with the judge's conclusion that the Union violated Section 8(b)(1)(A) and (2) of the Act by requesting the Employer to deny Noweski his proper seniority when he returned to work on September 12 and that the Employer violated Section 8(a)(3) and (1) by acquiescing in the Union's request.

Under the parties' practice, the employee who arrives first at a terminal and is put to work first is entitled to the first position on the seniority list. It is undisputed that Noweski began work before any other employee at the Parsipanny terminal. Accordingly, the judge found, and we agree, that he was entitled to be placed at the top of the seniority list.

Our dissenting colleague contends that Parsippany Terminal Manager Burr allowed Noweski to report first to the job, and consequently be given top seniority, when the terminal opened for the first time on April 28, notwithstanding the Employer's agreement with the Union that Raymond Doyle would report first and be given top seniority. Our colleague would not "permit the individual dealing between Burr and Noweski to trump the agreement between the Employer and the Union." We disagree. First, there is no showing that, at the time Burr and Noweski reached their agreement on April 27 for Noweski to sign in early the next morning, they were aware of a contemporaneous agreement between Employer Vice President Wolfe, neighboring South Plainfield Terminal Manager Brandowsky, and Union President Granello that Doyle (Granello's son-in-law) was to sign in first on the morning of April 28. Thus, the record does not establish that Burr entered into his agreement with Noweski notwithstanding—i.e., with knowledge of and in spite of—Wolfe and Brandowsky's contemporaneous agreement with Granello.

Second, Burr's arrangement with Noweski, made in Burr's capacity as terminal manager, and absent evidence of any hiring restrictions placed on Burr by the Employer, was entirely within his authority to staff the terminal on behalf of the Employer. As such, his agreement with Noweski was as much an agreement by the *Employer* as was the contemporaneous agreement by Wolfe and Brandowsky with Granello.[4]

Third, and perhaps most significant, article 3, section 1(c) the collective-bargaining agreement with the Union provides only that the Union is to be given *equal* opportunity with all other sources to provide applicants for

[4] Thus, we disagree with our colleague's characterization of the issue as whether Burr's "individual" dealings with Noweski can trump an agreement between the Employer and the Union. Our colleague does not dispute that Burr was acting on behalf of the Employer when he made the arrangement with Noweski, and he assumes that Burr had authority from the Employer to do so. Thus, the issue is more accurately characterized as whether the Employer's hiring Noweski, in the normal course of business, with the attendant assignment of seniority, was legitimate. We find that it was, particularly in light of art. 3, sec. 1(c) of the collective-bargaining agreement discussed in the following paragraph.

employment, thus giving the Employer the authority to hire from other sources as well.[5] That is what Burr did.

Accordingly, for these reasons, we find no merit in our dissenting colleague's position, and we adopt the judge's unfair labor practice findings.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that

A. Respondent Employer, Nationsway Transport Service, Parsippany, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unlawfully terminating its employees pursuant to the request of Respondent Union, Local 560, International Brotherhood of Teamsters, AFL–CIO, and thereby encouraging membership in a labor organization.

(b) Unlawfully denying its employees their proper seniority pursuant to the request of the Respondent Union, and thereby encouraging membership in a labor organization.

(c) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Gregory Noweski full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Grant Gregory Noweski his proper seniority, by placing him first on the seniority list of the Parsippany, New Jersey terminal.

(c) Jointly and severally with the Respondent Union, make Gregory Noweski whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. Backpay shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent Union's liability for backpay shall terminate 5 days after it notifies the Respondent Employer that it has no objection to the employment of Noweski and no objection to the grant of his proper seniority.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of, and unlawful denial of proper seniority to, Gregory Noweski, and within 3 days thereafter notify him in writing that this has been done and that the discharge and denial of proper seniority will not be used against him in any way.

(e) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at the facility to which the Parsippany, New Jersey terminal unit employees were transferred copies of the attached notice marked "Appendix A."[6] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent Employer's authorized representative, shall be posted by the Respondent Employer and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent Employer to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent Employer has gone out of business or closed the facility to which the Parsippany, New Jersey terminal unit employees were transferred, the Respondent Employer shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent Employer at any time since June 24, 1994.

(g) Post at the same places and under the same conditions set forth in paragraph 2(f) above, and as soon as they are forwarded by the Regional Director, copies of the Respondent Union's attached notice marked as "Appendix B."

(h) Furnish the Regional Director for Region 22 signed copies of Appendix A in sufficient number to be posted by the Respondent Union in places where notices to its members are customarily posted.

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent Employer has taken to comply.

B. Respondent Union, Local 560, International Brotherhood of Teamsters, AFL–CIO, Union City, New Jersey, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Requesting the Respondent Employer to terminate its employees, for reasons other than the failure to tender

[5] Thus, we do not agree with our colleague that Burr's agreement with Noweski is nullified by art. 6, sec. 2 of the collective-bargaining agreement, under which the Employer agreed not to enter into any agreement with its employees, individually or collectively, which conflicts with the terms and provisions of the contract. Burr was clearly acting within the authority provided by art. 3, sec. 1(c) of the collective-bargaining agreement to hire from any source, including the Union.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

uniformly required initiation fees and periodic dues, thereby encouraging membership in a labor organization.

(b) Requesting the Respondent Employer to deny its employees their proper seniority thereby encouraging membership in a labor organization.

(c) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Jointly and severally with the Respondent Employer, make Gregory Noweski whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent Union's liability for backpay shall terminate 5 days after it notifies the Respondent Employer that it has no objection to the employment of Noweski and no objection to the grant of his proper seniority.

(b) Notify the Respondent Employer, in writing, with a copy to Gregory Noweski, that it has no objection to the employment of Noweski and no objection to the grant of his proper seniority.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of, and unlawful denial of proper seniority to, Gregory Noweski, and within 3 days thereafter notify him in writing that this has been done and that the discharge and denial of proper seniority will not be used against him in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Union office copies of the attached notice marked "Appendix B."[7] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent Union's authorized representative, shall be posted by the Respondent Union and maintained for 60 consecutive days in conspicuous places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent Union to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Post at the same places and under the same conditions set forth in paragraph 2(e) above, and as soon as they are forwarded by the Regional Director, copies of the Respondent Employer's attached notice marked as "Appendix A."

(g) Furnish the Regional Director for Region 22 signed copies of Appendix B in sufficient number to be posted by the Respondent Employer at all places at the facility to which the Parsippany, New Jersey terminal unit employees were transferred where notices to its employees are customarily posted. Copies of that notice, after being signed by the Respondent Union's authorized representative, shall be returned to the Regional director for disposition by him.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent Union has taken to comply.

MEMBER HURTGEN, dissenting in part.

I do not agree with my colleagues' conclusion that the Employer and the Union (Respondents) violated the Act by taking away the top seniority of employee Noweski.

The Employer and the Union reached an ad hoc agreement that employee Doyle would report first to the job, and consequently would be given top seniority. Notwithstanding this agreement, Employer Manager Burr allowed employee Noweski to report first and to be given top seniority. I would not permit the individual dealing between Burr and Noweski to trump the agreement between the Employer and the Union. Indeed, article 6, section 2 of the collective-bargaining agreement seems to nullify such individual dealing.[8] At the very least, it was not unlawful for the Employer and the Union to give their agreement precedence over the individual dealing. Thus, the Employer and the Union were privileged to enforce their agreement by giving Doyle seniority over Noweski.

The agreement between the Employer and the Union was valid. Although it was not required by the collective-bargaining agreement, neither was it forbidden by that agreement. It was precisely the kind of interim detail that employers and unions often add to their basic collective-bargaining agreement.

My colleagues argue that Burr was acting on behalf of the Employer when he made the arrangement with Noweski. My colleagues miss the point. The issue is not whether Burr had authority from the Employer. I assume that he did. The issue is whether his dealings *with an individual employee* can trump an agreement between the Employer *and the Union*.[9]

My colleagues rely on article 3, section 1(c) of the contract. That section gives the Union only an equal opportunity to provide applicants. Thus, the Employer

[7] See fn. 6, supra.

[8] Art. 6, Sec. 2 provides:

> The Employer agrees not to enter into any agreement or contract with his employees, individually or collectively, which in any way conflicts with the terms and provisions of this Agreement. Any such agreement shall be null and void.

[9] The fact that Burr may not have known of the Employer-Union agreement does not privilege his individual dealing.

was free to hire Doyle and Noweski. However, the issue here is the relative seniority as between those two hired employees. The conduct here was designed to effectuate an Employer-Union accord to give seniority to Doyle.

In sum, it was not unlawful for the Employer and the Union to enforce their agreement by giving Doyle seniority over Noweski.[10]

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT unlawfully terminate our employees pursuant to the request of Local 560, International Brotherhood of Teamsters, AFL–CIO, thereby encouraging membership in a labor organization.

WE WILL NOT unlawfully deny our employees their proper seniority pursuant to the request of Local 560, International Brotherhood of Teamsters, AFL–CIO, thereby encouraging membership in a labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL , within 14 days from the date of the Board's Order, offer Gregory Noweski full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL grant Gregory Noweski his proper seniority, by placing him first on the seniority list of the Parsippany, New Jersey terminal.

WE WILL jointly and severally with Local 560, International Brotherhood of Teamsters, AFL–CIO, make Gregory Noweski whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, with interest.

WE WILL , within 14 days from the date of the Board's Order, remove from our files any reference to our unlawful discharge of, and unlawful denial of proper seniority to, Gregory Noweski, and WE WILL , within 3 days thereafter, notify him in writing that this has been done and that the discharge and denial of proper seniority will not be used against him in any way.

NATIONSWAY TRANSPORT SERVICE

APPENDIX B

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT request Nationsway Transport Service to terminate its employees, for reasons other than the failure to tender uniformly required initiation fees and periodic dues, thereby encouraging membership in a labor organization.

WE WILL NOT request Nationsway Transport Service to deny its employees their proper seniority, thereby encouraging membership in a labor organization.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, jointly and severally with Nationsway Transport Service, make Gregory Noweski whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, with interest.

WE WILL notify Nationsway Transport Service, in writing, with a copy to Gregory Noweski, that we have no objection to the employment of Noweski and no objection to the grant of his proper seniority.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of, and unlawful denial of proper seniority to, Gregory Noweski, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge and denial of proper seniority will not be used against him in any way.

LOCAL 560, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL–CIO

[10] I agree with my colleagues that the *discharge* of Noweski was not justified.

Richard Fox, Esq., for the General Counsel.
Edward Lyons, Esq. (Jones & Keller, PC.), of Denver, Colorado, for the Employer.
Paul Montalbano, Esq. (Schneider, Goldberger, Cohen, Finn, Solomon, Leder & Montalbano, P.C.), of Kenilworth, New Jersey, for the Union.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Based upon charges filed by Gregory Noweski, an individual, on December 21, 1994, in Case 22–CA–20363, and Case 22–CB–7933, a consolidated complaint was issued against Nationsway Transport Service (the Employer or Nationsway), and against Local 560, International Brotherhood of Teamsters, AFL–CIO (the Union or Local 560), on August 23, 1995.

The complaint alleges essentially that on June 24, 1994, the Union requested that the Employer terminate Noweski, and that the Employer did so on June 27. The complaint further alleges that following Noweski's reinstatement on September 12, the Union requested that the Employer deny seniority to Noweski, and that the Employer did so.

The complaint alleges that by this conduct the Employer and Union violated Section 8(a)(1) and (3) and Section 8(b)(1)(A) and (2) of the Act.

Respondents' answers denied the material allegations of the complaint, and asserted certain affirmative defenses which will be discussed infra, and on September 25–27, 1996, a hearing was held before me in Newark, New Jersey.[1]

Upon the evidence presented in this proceeding, and my observation of the demeanor of the witnesses, and after consideration of the briefs filed by all parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Employer, a corporation, having an office and place of business in Parsippany, New Jersey, has been engaged in the interstate transportation of freight. During the past year the Employer derived gross revenues in excess of $50,000 from the transportation of freight from New Jersey directly to points located outside that State. The Employer admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Employer and the Union admit that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Opening of the Parsippany Terminal

The Employer, a nationwide trucking operation, is extensively organized by the Teamsters Union, and employs nearly 5000 employees.

In early March 1994, Peter Granello, the president of Local 560, was advised by a Teamsters official that the Employer would soon be opening a terminal in Parsippany, New Jersey, which is within Local 560's jurisdiction, and wanted to sign a full freight agreement with the Union.

Calvin Wolfe, the vice president for human resources of the Employer, 1 month later, contacted Granello, and asked if he could supply two to four employees to open the terminal at 8 a.m. It was agreed that one of the four would punch in earlier than the others. Wolfe considered this arrangement a binding commitment by the Employer to the Union.

The collective-bargaining agreement's provision concerning hiring states that "when the Employer needs additional employees, he shall give the Union equal opportunity with all other sources to provide suitable applicants, but the Employer shall not be required to hire those referred by the Local Union." Wolfe routinely sought referrals through the Union as a ready source for quickly obtaining qualified employees.

Thereafter, on April 27, Larry Brandowsky, the Employer's terminal manager at a nearby facility, called Granello, and requested that Granello send four employees to the new terminal, at 8 a.m. the next day. Granello, in an effort to avoid a later dispute concerning seniority rights, suggested that the person that he proposed as the "union spokesman" arrive earlier than the rest, and that the times for the other employees be staggered, so that they arrived about 1 hour apart. Brandowsky agreed to have the spokesman arrive at 7 a.m., but insisted that the other workers arrive at 8 a.m.

Granello told Brandowsky that the union spokesman was Raymond Doyle, Granello's son-in-law. The function of a union spokesman was to serve as the "eyes and ears" in behalf of the Union, with the duties of a shop steward, but without the title or such benefits as superseniority. Jobs having less than 10 employees do not have a shop steward. Doyle was given four authorization cards and told to have his three coworkers sign them. Three other employees were contacted by the Union and told to report before 8 a.m.

Unknown to the Employer officials who dealt with Granello, on the same day, April 27, Noweski, a union member, was contacted by Don Burr, a sales representative for the Employer. Burr asked Noweski if he wanted to work at Respondent's new Parsippany facility. Noweski expressed concern that he would actually have a job at the new terminal, and would have to resign from his current position at Kramer Chemical, which was a Local 560 job as well. Burr assured him that he would have a job there, and Noweski agreed to begin work the next day. Burr and Noweski had worked together at a prior job.

Burr told Noweski that the job was scheduled to begin at 8 a.m., but that he should arrive earlier so that his paperwork would be completed, and he could begin work.

The following day, April 28, Noweski resigned from his job at Kramer Chemical, and arrived at the Employer's terminal at about 6:45 a.m. He completed an application for employment, and was assigned to sweep the dock area, which he did at about 7:15 a.m. Noweski began work before any other employee. Noweski saw Doyle arrive at about 7:25 a.m.

That evening, Doyle told Granello that, rather than the 4 workers expected by the Union, up to 11 employees worked that day. The next day, Granello visited the terminal and asked Burr what "these individuals were doing here," and told him that this was a Local 560 job. Burr replied that the company has the right to hire who it chooses.

When the terminal opened, a nationwide freight strike which apparently the Employer was not involved in, caused a great amount of work to be available at the Parsippany terminal. Burr was in charge of the facility for about 2 weeks, at which time Rex Madsen became the manager for about 1 month, until late

[1] Two pages of the hearing transcript were missing from my copy of the transcript. The parties supplied them by agreement.

May. Thereafter, Nelson Broaddus took over as terminal manger.

During the tenure of Burr, and for part of Madsen's service, the employees were told the night before whether they would be working the next day. From the opening of the terminal until mid-May, when the strike ended, everyone who appeared at the terminal worked. Madsen changed the method of assignments to a shape system, where workers would appear at 8 a.m. and would be selected for employment by the terminal manager. When the strike ended, there was less work, and only five or six employees worked regularly.

Doyle worked for the first 3 or 4 weeks the terminal was open, but was not thereafter selected for employment by Burr. It was reported to Granello by employees that Noweski was "in bed" with Burr, and that Noweski was selecting the men who would work, and that members of Local 560 were not being picked.

Although less work was available, due to the end of the strike, pursuant to a plan suggested by Noweski, Broaddus permitted all the employees to work a couple of days per week, so that all of them would receive 8 days of work per month, rather than have fewer employees work steadily. Once an employee works 8 days per month, he is entitled to health and welfare coverage for the following month.

Granello requested a meeting with Wolfe, and on about May 20 they met. Wolfe testified that the entire meeting concerned why Doyle was not working, and when he would be put to work. Granello told him that Burr started off improperly by hiring the "wrong people," and that there were "good guys" and "bad guys" at the terminal. Wolfe asked him to identify the "bad" workers, but Granello refused. Granello did not ask him not to work Noweski, whose name did not come up in that meeting. Granello said that Doyle should have been hired. Wolfe told Granello that he heard that Doyle was lazy. Granello disputed that, and asked that Doyle be given a chance to see how he performed.

After the meeting, Wolfe called George Roberge, the Employer's regional manager. Roberge said he heard that Doyle was lazy, slowed the operation, and he did not want to try out Doyle. Wolfe called Granello and told him of his conversation with Roberge, and that he would not be able to work Doyle. Granello was disappointed.

A few days later, however, Wolfe spoke to Broaddus, and asked him to give Doyle a chance, saying their poor reports about him were based only upon hearsay. Broaddus agreed, put Doyle to work, and later called Wolfe and told him that he was "pleasantly surprised" and believed that he would be "all right." Broaddus testified that he had not heard any unfavorable reports concerning Doyle, who had not been working when he arrived at the terminal. Broaddus put him to work upon Roberge's orders, who said that he should be treated as any other casual employee.[2]

Granello testified that his meeting with Wolfe concerned Doyle as only one of its topics. He conceded asking Wolfe why Doyle was not working, and when told the reason, denied that Doyle was lazy. He also told Wolfe that before any employee was placed on the seniority list, the Employer should do a "good background check." Granello was also concerned that many Local 560 members were unemployed as a result of the closing of a nearby trucking company.

In late May, immediately after Broaddus became terminal manager, Granello visited him, and mentioned certain contractual issues that should be addressed, such as the absence of a timeclock, and the fact that the work was being spread among all employees in order to secure 8 days of work for the purpose of their welfare coverage. Thereafter, about two or three meetings between Broaddus and Granello were held between May and mid-June, at the request of Broaddus.[3]

A meeting between Broaddus and Granello was held on May 26. According to Broaddus, the purpose of the meeting was to establish a rapport and business relationship, and to review Broaddus' concerns concerning problems at the terminal. Broaddus sought help from Granello in establishing a seniority list. He showed Granello a list of 10 workers currently employed at the terminal, and asked if he would recommend anyone on the list. Granello mentioned Doyle and Barnes. Granello told Broaddus that there were some bad people on the list, and that the Employer should be "cautious" and do its "homework" concerning some on the list. He did not mention who they were or ask that he not work any employees. That list was prepared by Burr, and was used by Broaddus when he took over as manager.

Granello testified essentially consistently with Broaddus, except that he denied telling Broaddus that there were bad people on the list, and that the Employer should be careful who it hired. Granello further told Broaddus that there was still a "problem" with Doyle, in that he was not working, and as a result the Union had no representation at the terminal. Broaddus requested help in selecting employees for the seniority list, telling him, according to Broaddus' testimony, that he had applications of 10 workers who had been approved for hire, 1 of whom was Noweski.[4] Granello said that the Company did not accept his suggestion of April 27, which was to start Doyle, and stagger the employment of the rest of the workers. Granello advised Broaddus to check the timecards, and establish seniority based upon the employee who was first to punch in, or had his time marked on the card.

Broaddus testified that, although the timecards were not available, he learned from the employees the days and times they started. He told Granello that it appeared that Noweski had started first on April 28. Granello told him that he had a "problem" with that. Granello testified that no one other than Doyle was supposed to have been at the terminal at 7 a.m., and that his reference to a "problem" concerning Noweski was that the agreement between the Union and Brandowsky, pursuant to which Doyle would be the first to be employed, and would start at 7 a.m., had been violated.

Granello also rebuked Broaddus for agreeing to the arrangement for sharing the work so that the men would receive 8 days of employment per month so that their welfare benefits would be covered. Granello told him that such manipulation of days of work for insurance purposes was not permitted.

[2] I reject the Employer's argument that the Board agent who interviewed Broaddus improperly did so without the Employer's attorney being present. The interview was arranged during Broaddus' employment, but did not actually occur until after he resigned. Broaddus asked the Employer for legal representation at the interview, but was encouraged by Wolfe to attend alone.

[3] The precise dates of the meetings are not clear, and certain statements testified about may have occurred at different meetings.

[4] Broaddus testified that those 10 men had been picked by himself and Roberge.

Broaddus testified that about 1 week after he became employed at the terminal, Noweski told him of the arrangement between himself and Burr. Noweski said that a deal had been made pursuant to which Noweski would start work early on April 28, and would accordingly be number one on the seniority list when one was established, and in exchange, Noweski would keep out of the terminal the "riff raff" that the Union would send. Noweski denied having that conversation with Broaddus.

B. The Events of June 24

On June 24, Broaddus met with Granello at the union hall. Broaddus testified that they discussed several matters, including Noweski. Granello told Broaddus that he was told that Noweski called the pension and welfare fund, misrepresented himself as the shop steward at the terminal, and obtained information concerning other employees to which he was not entitled.[5] Broaddus replied that that was a union problem, having nothing to do with the Employer. Granello answered that he would bring it to the "council" and prefer charges against Noweski. Broaddus repeated that it was a union problem and not a company problem, and he offered to relay a message that Noweski should contact Granello.

Granello also mentioned that he objected to Noweski's seniority based upon his starting time of 7 a.m. since the Union had not been given an equal opportunity to have employees begin work at the agreed-upon time, and that the agreement between he and Brandowsky was that the job was supposed to open at 8 a.m.

Broaddus testified that Granello was "quite upset" that the Union did not have an equal opportunity to have workers represented by it start work at the same time, and were not now given an opportunity to work.

Broaddus told Granello that he was not at the terminal when this occurred, and asked for advice on what to do now. Granello replied that the timecards should be used to base decisions on seniority.

Granello also objected to Noweski's allegedly maintaining seniority on two jobs, Nationsway, and at Kramer Chemical, which was not permitted. Broaddus again responded that that was a union problem, and not a company problem. Broaddus told him that other people might be guilty of dual seniority, naming McNamara and one other.

Granello testified that he told Broaddus that Noweski misrepresented himself as the steward, and obtained information to which he was not entitled, and that he was the "ringleader" behind the effort to spread the work among all the employees so that they could obtain welfare benefits. He also told Broaddus that he suspected that Noweski "blackballed" certain employees.[6] He also believed, which he did not mention to Broaddus, that Noweski maintained seniority with two companies. Granello was told by Broaddus that Noweski was behind the scheme to share the work so that all employees would receive 8 days work per month.

Following the meeting, Broaddus called his supervisor, Roberge, and told him that he met with Granello, and there appeared to be much confusion at the terminal, including the fact that employees started work at the same time. He told Roberge that he learned that Noweski started work at 7 a.m. with the approval of the Employer. Broaddus called Brandowsky, who told him that he was instructed to begin the job at 8 a.m. Broaddus then called Burr, and was told that Noweski began work at 7 a.m. because he directed him to clean the dock.

Broaddus testified that following his discussion with employer officials that day, he had not made any decision concerning Noweski's employment the next workday, June 27. He stated that he had a lot of "homework" to do—and a lot was "going on" which he was not aware of, or knowledgeable about, which he wanted to investigate further, including determining whether the information he received was accurate before he "went forward."

C. The Events of June 27

Noweski shaped on June 27. When he was not selected for work, he asked Broaddus for an explanation. Noweski testified that Broaddus told him that he had a meeting with Granello 3 days before, and that Granello told him that Noweski had certain problems, including maintaining seniority on another job, representing himself as the shop steward, attempting to defraud the pension and welfare fund, and blackballing other union members.

Noweski protested that the allegations were false, informing Broaddus that he resigned from his prior job before beginning work at Nationsway; that he called Fund Administrator Kaplan and asked about his own benefits, and told her that others wanted to ask her about their benefits, but not representing himself as the steward; that he had no input as to which employees were hired, and did not blackball anyone.

Noweski further testified that Broaddus said that those were not his problems, but the Union believed that they were problems that Noweski needed to resolve. Noweski stated that Broaddus flatly told him that he would not be put back to work until he "straightened out [his] problems with the union," and suggested that he see Granello and "get it straightened out," and that Noweski should let him know "how I made out."

Noweski stated that he immediately visited Granello at the union office, and asked "what are you doing to me? I'm without a job now. Because you're making accusations to the company that don't have anything to do with the company. Broaddus told me he couldn't work me until [you] and I straightened our problems out."

Noweski and Granello discussed each of the issues, with Noweski giving explanations for each alleged wrongdoing. Regarding the dual seniority matter, Granello told Noweski that his pension and welfare records showed that contributions were

[5] Ellen Kaplan, fund administrator, testified that prior to June 1994, she was told by Granello that his son-in-law would be shop steward at the new Nationsway terminal. Thereafter, she received a call from Noweski who identified himself as the steward at the terminal. He asked for, and Kaplan gave him information concerning the eligibility for benefits of several employees employed at the terminal. Kaplan stated that such information concerning others may be given to stewards, but not members. The following day she told Granello that she spoke to his son-in-law, Noweski. Granello replied that Noweski was not his son-in-law. Kaplan then told him that Noweski had called, representing himself as the steward.

[6] Broaddus believed that Noweski and Burr had been involved in the selection of applicants. Noweski told Broaddus that employee Quirk had an accident with a truck which he did not report, implying, but not saying that Broaddus should not employ him. Broaddus was told by Burr to consult Noweski if he had any questions or concerns about anyone, and applicants came to the terminal asking to see Noweski about a job. Nevertheless, Broaddus did not accept at face value what Noweski told him, and evaluated employees on their own work performance. Noweski denied speaking to Burr about other drivers.

made in his behalf by Kramer through mid-May, and he therefore believed that Noweski was still employed by that company. Noweski told Granello that he resigned from Kramer on April 28, and that those contributions represented payments upon sums for accrued vacation, sick, and personal leave, and days worked during the last week in April. Granello made inquires of the Union's business agent who serviced Kramer, and Kramer's terminal manager and bookkeeper who confirmed Noweski's explanation. With that, Granello said this matter was "resolved." Granello testified, conceding that that issue was no longer a problem.

Noweski also told Granello that he did not represent himself as the shop steward in his conversation with Kaplan. Granello replied that Kaplan told him that he did, and Granello chose to believe her. Noweski testified that he asked that Kaplan meet with them, and Granello refused.

Noweski further told Granello that he did not blackball any employees, and that the terminal manager had no reason to listen to him. Granello said that he received information from employees that Noweski did so, and that he and Burr had discriminated against members of Local 560.

Granello also told Noweski that he devised a "scam" with Broaddus to work 10 employees when there was only work for 5 so that all the employees would be eligible for welfare benefits. Granello said he would not condone that practice. At hearing, Noweski admitted doing so.

Noweski testified that at the end of their discussion, he asked Granello to call Broaddus and tell him that they resolved their differences so that he could return to work. Granello testified that he was just asked to tell Broaddus that Noweski had no union problems. Granello replied that he wanted to take the matters to the Union's executive board which was meeting that afternoon. Granello testified that he told Noweski that as far as Granello and the Union were concerned, he did not have any union problems, but that he wanted to take it to the board.

Noweski asked to be present at the meeting, but the request was denied as it was a closed meeting. Noweski testified that he told Granello that if he did not get the matter resolved, he was not working and had no job. Granello replied that he had to take it to the executive board, and he would be guided by its decision.

At the executive board meeting that day, it was decided that Noweski was a probationary or casual employee since he did not have 30 days of seniority at the Employer, and since he was in that category, the Union would not call the Employer on his behalf, and it did not. Granello testified that, as a casual or probationary employee, the worker is an at-will employee until he attains seniority. Accordingly, the contractual grievance process is not available to him since the Employer can refuse to employ him for any reason before he attains seniority.

Granello denied telling Broaddus not to work Noweski, or not to permit him to attain seniority. Indeed, Broaddus does not claim that Granello told him to take any action against Noweski.

Noweski testified that following the meeting, he returned to the terminal and told Broaddus that he "justified" all the accusations against him by Granello, and had "straightened" them out. He informed Broaddus that Granello said he would take the matter to the Union's executive board. Broaddus then told Noweski that he could not work until he had his union problem straightened out. Noweski, angered, replied that Broaddus was "rolling over" under the pressure that Granello placed upon him, and that he believed that Granello would do whatever he could to ensure that his son-in-law Doyle had number one seniority. Broaddus asked him what difference did it make if he was number two, three, or four? Noweski, angered during this "heated" conversation, replied that he would not stand for it, would not get "fucked" by the Employer or anyone else, that he had done everything asked to resolve his union problems, and that he would go to every agency he could to seek redress. Noweski further stated that Broaddus then told him that he would not put him back to work until he heard from Granello that his union problems were resolved, and that Broaddus told him that "as soon as he heard something from Granello he would be in touch with me."

Broaddus' version of their conversations were that he told Noweski, at the June 27 morning shape, that it was in his "best interest" to contact Granello to straighten out "some union matters." Broaddus denied telling him that he could not work until the union matters were resolved. At that point, Noweski became "quite upset" and accused Broaddus of "screwing" him out of 8 days' employment for the month, and thus from health and welfare benefits for the following month.

Broaddus conceded asking Noweski why he would not accept the number two, three, or four position. Noweski replied that he had won the first spot "fair and square." At the hearing, Broaddus explained that at that time he was aware of the arrangement between the Employer and the Union that employees would open the job at 8 a.m., and that the plan between Noweski and Burr, pursuant to which Noweski would appear at 7 a.m. was improper and not authorized by the responsible officials, Roberge and Brandowsky.

Broaddus testified that Noweski's accusation that he "rolled over" to Granello's pressure implied that he had to accept the improper arrangement between Noweski and Burr that Noweski would begin work first. Broaddus stated that he would not do so, since he knew that Noweski had not properly won the first place for employment.

Broaddus stated that Noweski threatened him by saying that he would go to the Federal authorities, and bring a lot of "heat" on him. At the end of the conversation, Noweski asked if he should appear for the shape the next morning, and Broaddus told him that it was an 8 a.m. shape. Broaddus did not tell his superiors of his confrontation with Noweski because he did not want to jeopardize Noweski's future employment possibilities with the Employer.

Broaddus stated that on June 27, he was aware that Noweski was very close to attaining seniority—that he needed only 1 or 2 days to make the list. Noweski shaped from June 27 to September 12, and was not selected for employment by Broaddus.

Broaddus gave the following reasons for not picking Noweski for work after June 27 (a) he had "homework" to do to see if the responsible employer representative had authorized someone to start work earlier than 8 a.m.; (b) Noweski's employment references had not been completed, his being the only application which was not complete[7]; (c) he refused to be "intimidated" by Noweski's threats; (d) he would try out other employees; and (e) he wanted to give some time to Noweski to "cool down." Broaddus also understood that until an employee

[7] In this connection, Wolfe stated during the period May through September, several employees were approaching 30 days of employment, at which point the Employer is obligated to place them on a seniority list, but that their required documents had not yet been received.

worked 30 days in a 90-day period, he was a probationary employee, and the manager had no obligation to put him to work if he did not choose to.

On June 27, Broaddus did not tell Noweski that his references were not complete, or that one of the reasons for his not working was that his references were not finalized. His references became complete in September, after he returned to work, and had worked a few days. Broaddus conceded, however, that in late June, everyone was shaping and working as their applications were being completed.

Broaddus testified that after June 27, based upon a conversation with Burr, Broaddus believed that he was being intimidated by Burr. Burr told Broaddus that he owed Burr his job because Burr recommended him. Burr asked "why are you doing this to me?" according to Broaddus, a reference to him refusing to employ his friend Noweski. From this, Broaddus believed that unless he continued to support the arrangement between Noweski and Burr, pursuant to which Noweski would be employed in the number one position, and keep the union "riff raff" out, it would be "difficult" for Broaddus at work.[8]

Broaddus stated that when he became aware that if he did not go along with the arrangement things would be difficult for him, he "blamed" whatever had happened on the Union. He told Burr that he had nothing to do with what had occurred, but rather it was a "union problem," and that he told Noweski that he had to straighten out certain matters with the Union, and told Burr about Granello's complaints concerning Noweski's dual seniority, his representation of himself as the steward, and other issues.

Thus, Broaddus testified that the reasons that he refused to work Noweski were as set forth above, that he had to learn whether Noweski was authorized to begin work at 7 a.m., his application was not complete, he refused to be intimidated by Noweski's threats, he wanted to work other employees, and because he wanted him to cool down. However, when confronted by Burr, he blamed his refusal to work Noweski on the Union.

Broaddus explained that he blamed Noweski's situation on the Union because he would not surrender to intimidation, and would not be a party to the clandestine arrangement between Burr and Noweski. In support of this, Broaddus stated that when Noweski accused him of "rolling over," and said that he won the first position "fair and square," Broaddus believed that Noweski was demanding that he go along with the arrangement between Noweski and Burr, which he refused to do because he would not be part of a plan which did not have the authorization of company representatives Wolfe and Roberge, and he knew that Noweski obtained the number one spot by subterfuge. Further, Broaddus refused to be intimidated by Noweski's threats to seek help from government authorities.

Broaddus added that Noweski had the "ability to clear up" the matters that concerned Broaddus—that Noweski and Burr had to acknowledge that their arrangement was without authorization by the Employer.

Broaddus conceded that on the morning of June 27, he knew about the plan between Burr and Noweski, was also aware that Roberge and Brandowsky were not aware of the plan, and understood that Noweski's application had not been completed, and had "homework" to do, all of which had to be completed before Noweski could return to work. Nevertheless, the only thing he told Noweski that morning was that it was in his "best interest" to straighten a few matters out with Granello.

D. The Grievances and Arbitrations

On July 8, Noweski complained to Edwin Stier, the court appointed trustee for the Union, that he did not receive credit for 2 days in which he trained other drivers, and which would have resulted in him obtaining seniority, having met the 30 days' requirement. Noweski also told Stier that Broaddus refused to select him for work because of his union problems. Noweski stated that the Departments of Justice and Labor conducted investigations and found that Granello did not violate his duty to the union membership.

On July 13, Noweski filed a grievance, claiming that he was entitled to 2 days' pay for work performed, including 1 day as a driver-trainer. Ernie Soehl, the Union's business agent, met with Noweski and learned the details of the grievance. Soehl determined that the grievance had merit, and discussed the matter with employer officials Roberge and Wolfe. They told Soehl that Noweski was not being worked because he cursed at Broaddus.

A union executive board meeting was held on July 15, which concerned Noweski's representation as the steward, at which Noweski and Kaplan testified. Union Business Agent Soehl, who was also an executive board member, testified here that Noweski asked the Union to call the Employer and "order" it to work him. The executive board decided that it would not do so since he was a casual employee, and had no rights under the contract. Broaddus told Soehl that it would not work him because he cursed him.

Wolfe testified here that sometime thereafter, Stier told him that his investigation concerned whether Noweski's rights were violated by the Employer or the Union, and that one way the matter could be resolved was if he was returned to work. Wolfe spoke to Soehl. Soehl argued that Noweski was entitled to the day's pay toward his seniority, explaining that when a driver starts the engine of a truck, he is entitled to be paid for that day. The Employer argued that Noweski's agreement to train other drivers was voluntary. A settlement was agreed to pursuant to which Noweski was paid for the one day in which he trained and evaluated other drivers, resulting in him obtaining seniority status.

Pursuant to that agreement, Noweski returned to work on September 12. A question was raised as to where Noweski belonged on the seniority list. Union Agent Soehl testified that he was asked by the Employer for guidance as to where to place Noweski on that list. Soehl advised that Noweski should be in the number two position, after Doyle, and ahead of McNamara. Accordingly, a seniority list, dated September 12, listed Doyle first, Noweski second, and McNamara third.

Upon being shown that list, Noweski told Broaddus and Soehl that he should be number one since he began work first, and was entitled to 11 weeks' backpay. Soehl suggested that he file grievances as to those matters.

Noweski filed two grievances. The first, on September 14, claimed that he was deprived of work between June 24 and September 9, because of the Employer's refusal to recognize his seniority. Noweski's argument was that since the previous settlement gave him retroactive seniority to April 28, he was entitled to pay for work he was not permitted to perform before his reinstatement. The second grievance, filed on September

[8] The first time Broaddus revealed his knowledge of this plan to the Employer or Board was during the week that this hearing took place.

14, asserted that the seniority list of September 12 improperly placed him in the number two seniority position, instead of first.

As a result of Noweski's being given the number two position, employee James McNamara, who had been number two, and was thus placed in the number three position, filed a grievance on September 22, which asserted that he should have been placed in the number two seniority position on the seniority list of September 12. His argument was that inasmuch as he was "ordered in" by the Union, and Noweski was not, he had seniority over Noweski. Apparently Union Agent Soehl supported that position. Soehl testified here that someone sent from the union hall was guaranteed a starting time over someone not sent from the Union, reasoning that by such an order, the Employer was guaranteeing, and was obligated to pay for, a day's work for the person sent, even if he did not work. Soehl stated that it was his position before the arbitration committee that the men sent from the Union were guaranteed a starting time over someone not so sent.

Soehl explained the collective-bargaining agreement's provision giving the Union an equal opportunity to refer employees as not being applicable here, where the Union and the Employer agree to employ certain union personnel. In such a case, the persons sent are guaranteed work, and if they do not work, they are entitled to be paid.

The three grievances were scheduled for hearing on November 17 before the New Jersey/New York Regional, Contract, Specialty, Private and Railhead Carrier Joint Area Committee. The committee is comprised of representatives of the local unions and employers who are signatories to collective-bargaining agreements in the area covered by the committee.

Noweski requested a postponement of his two grievances, which was granted over the Employer's objection, since its witness was en route from Colorado at the time of the request.

The committee, which is comprised of an equal number of employer and union representatives, hears and decides grievances which cannot be settled on the local level. Of the three union representatives who heard the grievance, one was Carmen Pizzuto, who is the vice president of the Union. Inasmuch as the Union was a party to the case, Pizzuto was recused from the discussion or vote on the outcome of the grievance. However, he was present at, but did not participate in, the executive session during which the grievance was discussed and decided. The rules of procedure of the committee provides that "no representative of a local union or the employer party to a grievance shall be permitted to act as a member of the panel hearing the case." In order to equalize the number of representatives, Employer Representative Ernest Salvino also recused himself.[9]

Union Business Agent Soehl presented the case in behalf of McNamara, stating McNamara's position, and seeking "guidance" and a decision on the seniority issue. The Union also stated that Doyle was not part of the grievance. Rather, the grievance was between McNamara and Noweski. Employer's representative, Wolfe, stated that he had an agreement with the Union whereby the Union would provide personnel to open the terminal, and that Burr's arrangement with his "friend" Noweski was not authorized by the Employer, and that the Employer intended that the Union would provide all the employees.

The committee decided that McNamara was denied permission to punch in at 7 a.m. on April 28, and that he should have been in the number two position. Noweski's position was dropped to number three. The decision was final and binding upon the parties pursuant to the terms of the collective-bargaining agreement. Soehl told Noweski that the committee decided that the Union referred employees, Doyle and McNamara were entitled to preference over Noweski, who was not referred by the Union.

On January 13, 1995, Noweski's grievances were heard by the committee, which included Pizzuto. Although the minutes do not so reflect, Salvino testified that Pizzuto and he recused themselves from the decision making process. The Union argued that Noweski was entitled to the number one position, and 56 days' backpay. Noweski addressed the committee. It should be noted that in his pretrial affidavit, Soehl stated that he did not care who the Employer worked, but he believed that the men sent to work by the Union should have been put to work first. Soehl also stated that Burr refused to permit Doyle to sign in for work until after his friend Noweski had signed in. At the arbitration, Soehl's position statement set forth that Doyle was first on the seniority list because "this Local Union felt that a man sent from the union Hall and the Company was guaranteed starting time over someone who was not sent from the Union Hall. We are asking this Committee for guidance on the seniority order for the men involved at this facility."

It should be noted that the Employer's position on the grievances of McNamara and Noweski, as stated by Wolfe, mistakenly referred to the contract as requiring the Employer to give the Union "first opportunity" to provide applicants, rather than "equal opportunity." Wolfe also stated that Burr had no authority to make an arrangement with Noweski to report to work, when complete arrangements had been made between him, Brandowsky, and Granello.

The committee denied the grievances without opinion, and upheld the seniority list as previously decided.

III. ANALYSIS AND DISCUSSION

A. The Termination of Noweski

The complaint alleges that on June 24, the Union requested the Employer to terminate Noweski, and on June 27, it did so.

Section 8(b)(2) of the Act makes it an unfair labor practice for a labor organization to cause or attempt to cause an employer to discriminate against an employee to encourage or discourage membership in any labor organization. Section 8(b)(1)(A) makes it an unfair labor practice for a union to restrain or coerce employees in the exercise of their Section 7 rights. As the Supreme Court stated in *Radio Officers v. NLRB*, 347 U.S. 17, 40 (1954):

> The policy of the Act is to insulate employees' jobs from their organizational rights. Thus, [Sections] 8(a)(3) and 8(b)(2) were designed to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood.

Respondents argue strenuously that no request to terminate has been proven. I agree that there is no evidence of an express request by the Union to the Employer that it terminate Noweski. However, "direct evidence of an express demand by the

[9] Salvino is not affiliated with the Employer. He heads Salvino Management Services, Inc., a private company providing labor relations services to trucking companies. His company prepares the files in grievances arising on the East Coast, and arranges hearings of the grievances.

Union is not necessary where the evidence supports a reasonable inference of a union request." *Avon Roofing & Sheet Metal Co.,* 312 NLRB 499 (1993). In addition, a union "may be held accountable for results triggered by what on the surface appears an innocent act which the union well knew would produce a desired result." *Teamsters Local 331 (Statewide),* 315 NLRB 10 fn. 2 (1994). Further, the relationship of cause and effect, an "essential feature" of Section 8(b)(2) "can exist as well where an inducing communication is in terms courteous or even precatory as where it is rude and demanding. It is essentially a question of fact in each case what has caused an employer to discriminate unlawfully against organized or unorganized employees." *NLRB v. Jarka Corp. of Philadelphia*, 198 F.2d 618, 621 (3d Cir. 1952).

The question to be decided is whether Granello's conduct amounted to a request—whether by his conduct he caused the termination of Noweski. Although Granello may not have demanded Noweski's discharge, a discharge may be caused by less than an express demand. It may be caused by conduct which from the circumstances of the case can only be construed as intended to cause a discharge*, Food & Commercial Workers Local 454,* 245 NLRB 1295. 1297 (1979).

Here, it is necessary to evaluate the motivation of the Union in transmitting information to the Employer. "If a union, for an improper motive, even without a demand or request of any kind, communicates information to an employer as a means of inducing the employer to terminate that employee, a violation may be found." *Graphic Arts Local 280 (Balzer-Shopes),* 274 NLRB 787, 792 (1985), citing *Yellow Freight System,* 197 NLRB 979, 981 (1972). Those cases involved the union's bringing to the attention certain company rules that were allegedly violated by the employees. Here, the transgressions brought to Broaddus' attention involved either breaches of union rules—misrepresentation as a shop steward, blackballing members of the Union, or possibly union-employer rules, holding of dual seniority, and alleged defrauding of the welfare plan.

I first find that Noweski was terminated on June 27. Broaddus refused to select him when he shaped, and admitted that he did so for various reasons.

In order to determine whether the Union caused the Employer to terminate Noweski, the context of the crucial conversation between Granello and Broaddus on June 24 must be examined. Prior to the meeting, Granello was admittedly upset that Noweski had apparently subverted an agreement between him and the Employer pursuant to which Doyle, Granello's son in law, would arrive first at the terminal's opening day.

First, I find that although the Union and Employer believed that their arrangement was binding upon them, and they may have believed that it was, such an arrangement could not upset the hiring of Noweski, once made.

Wolfe testified that Burr, as a salesman, had no authority to promise Noweski a job, and had little or no operational responsibility with the Employer. Brandowsky was supposed to open the Parsippany terminal, but could not do so. Burr was given the assignment, according to Wolfe, to simply open the facility, provide basic security, see that nothing was stolen, and begin the paperwork for the new employees. Wolfe noted that Burr had no authority to change or depart from the arrangement made with Granello that four employees sent by the Union would open the terminal. It must be noted, however, that the complaint's allegation that Burr was the regional sales manager, and a supervisor and agent of the Employer was admitted, with the notation that such status was limited in scope and constraint by the collective-bargaining agreement. I find nothing in the contract to limit a supervisor's ability to hire. As the terminal manager, Burr had actual, if not apparent authority to hire. See *Victor's Cafe* 52, 321 NLRB 504 fn. 1 (1996). Moreover, Wolfe became aware of Noweski's hire, and did nothing to have him removed because of Burr's alleged improper arrangement, thereby condoning the hire.

Wolfe's statement before the arbitration committee asserted that he considered Burr's arrangement with Noweski that Noweski arrive at the terminal first to be void since it violated article 6, section 2 of the collective-bargaining agreement. That section provides: "Extra Contract Agreements: The Employer agrees not to enter into any agreement or contract with his employees, individually or collectively, which in any way conflicts with the terms and provisions of this Agreement. Any such agreement shall be null and void."

First, assuming that Burr and Noweski entered into an agreement that Noweski begin work ahead of others referred by the Union, such agreement did not conflict with any other terms of the collective-bargaining agreement. The other term of the agreement involved herein is that the Union be accorded equal opportunity with all other sources to provide applicants. Burr's arrangement with Noweski did not violate that provision.

Even assuming the hire of Noweski was made in contravention of the agreement between the Employer and Union, the question is the effect of that agreement upon Noweski. He did not violate any apparent term of the collective-bargaining agreement or established policy by obtaining the job from Burr in the manner in which he did. First, the contract provides that in hiring, the Employer must give the Union "equal opportunity" to provide employees. That provision permits the Employer to hire on its own if it wishes. Here, Burr as the terminal manager at the time, acted with the actual, if not the apparent authority of the Employer in contacting Noweski and offering him a job. Noweski did nothing improper in accepting the offer and reporting to work when asked. Certainly when viewed from Noweski's perspective, he was offered a job, resigned from his position at Kramer, and reported to work at the job offered.

Further, if Noweski had done something improper in obtaining employment in contravention of the agreement between the Employer and the Union, no action was taken against him or Burr, until June 27, notwithstanding that Wolfe and Granello were aware that Burr and Noweski had allegedly engineered his early arrival at the terminal. Rather, the Employer continued to work Noweski without incident or complaint until June 27.

Upon the facts set forth here, if Noweski was discharged because he was not referred by the Union, a violation would be established. See *Teamsters Local 331 (Statewide),* 315 NLRB 10, 11 (1994); *P.P.G. Industries*, 229 NLRB 713, 715 fn. 17 (1977).

In the meetings between Broaddus and Granello prior to June 24, even according to Granello's testimony, he said that he had a "problem" with Noweski's top seniority since Doyle was supposed to have started first. Even if this related to, as Granello testified, the abrogation of the agreement between the Union and Employer and not a problem with Noweski himself, nevertheless, it became obvious to Broaddus that Granello was not happy with Noweski securing the top seniority position. That the effect was felt upon Broaddus appears obvious, when during the final June 27 conversation, Broaddus asked Noweski

why he would not accept the number two, three or four position.

I cannot give the credit urged by the Union to Granello's statements to Broaddus that, when determining seniority, he should be guided by the timecards, and assign top seniority to the person who signed in first. Although such a procedure would clearly give the first position to Noweski, Granello had a "problem" with Noweski's receiving that spot. Thus, at first blush, Granello's suggestion of that procedure might appear to be evidence of a lack of animus toward Noweski. However, his objection to Noweski's being first, even upon the application of that method of determining seniority, underlies his true motive.

B. The Causation of Noweski's Termination

At the June 24 meeting, Granello brought to Broaddus' attention various complaints he had with Noweski—his alleged misrepresentation as a shop steward and receipt of privileged information, his upset that Noweski was first on the seniority list, his alleged maintenance of dual seniority, and his effort to spread the work to all employees for the purpose of their maintaining welfare coverage.

All of these matters were not the Employer's concern. In fact, Broaddus properly told Granello that those were the Union's, and not the Employer's problems. Nevertheless, on the next business day, June 27, Broaddus refused to work Noweski and concededly told him that it would be in his best interest to straighten out some union matters with Granello.

I credit Noweski's testimony that Broaddus told him that he would not be put back to work until he "straightened out" his union problems. In *Quality Mechanical*, 307 NLRB 64, 66 (1992), the Board, in holding that the employer and union violated the Act, found that the employer conditioned the employee's return to work upon his "straightening out his problem with the union." The speed with which Noweski addressed the matter, visiting Granello immediately, indicates that there was great urgency in his need to resolve the issues between he and the Union. The importance which Noweski placed on the successful resolution of the matter was clearly, as he testified, because his job was dependent upon it. If Noweski believed that his visit to Granello had no impact upon his employment, he may have waited to see him.

In addition, Broaddus' admitted testimony that he told Noweski that it would be in his "best interest" to straighten out his Union problems adds support to a finding that Broaddus was told not to work Noweski until such matters were resolved. Why would it be in Noweski's best interest to do so, especially since Broaddus asserted that he told Granello that Noweski's alleged wrongdoings were the Union's problems, and not the Employer's.

At their meeting, Granello and Noweski discussed each of the alleged infractions committed by Noweski, and he asked Granello to call Broaddus and tell him that their differences were resolved so that he could return to work.

Granello conceded that Noweski asked him to call Broaddus. What was the purpose of the call if not to clear Noweski for work? Granello's testimony was that he was just asked to tell Broaddus that Noweski had no union problems. Of what concern was that to Broaddus, especially where he was so insistent that that was a matter of import only to the Union and not the Employer?

Granello testified that although he told Noweski at the end of their meeting that as far as he and the Union were concerned Noweski had no union problems, he wanted to take the matter to the executive board. If all he was being asked to do was to call Broaddus and tell him that Noweski had no union problems, which he conceded he did not, why did he refuse to make the call?

Based upon the above, an inference may properly be drawn that Granello told Broaddus not to work Noweski because of his upset at Noweski's frustration of the plan to have Doyle begin employment first at the terminal. Clearly, if, as Granello admitted, Noweski no longer had any union problems, why wasn't a call made in his behalf.

The action of the executive board that day supports a finding that the Union caused the Employer to terminate Noweski. Thus, the executive board decided that since Noweski was only a casual or probationary employee, the Union had no obligation to call the Employer on his behalf. Nevertheless, as noted in General Counsel's brief, Granello interceded in behalf of probationary employee Doyle, who was not being worked by the Employer. Such intercession included calls and a personal visit with Wolfe to plead Doyle's case.

It also must be further noted that Broaddus appeared to be dependent upon Granello for assistance in setting up the seniority list. Broaddus initiated meetings with Granello where they spoke about the list, he asked Granello for recommendations concerning the list, and they discussed Broaddus' concerns regarding problems at the terminal. Under such circumstances, it is likely that Broaddus would be amenable to any suggestions or requests made by Granello concerning the termination of Noweski.

I accordingly find and conclude that Granello's June 24 conversation with Broaddus which outlined the Union's grievances against Noweski establishes, when viewed in context with all of the facts, that the Union caused the Employer to terminate Noweski. *Wenner Ford Tractor Rentals,* 315 NLRB 964, 965 (1994).

There is a sufficient nexus between Granello's June 24 conduct and Broaddus' refusal to work Noweski on June 27 to meet the test of 8(b)(2) causation. Even if Granello did not act for the specific purpose of causing the Employer to refuse to work Noweski, he nevertheless acted knowing that this particular result would follow. That is sufficient causation. *Bricklayers Local 1 (Denton's Tuckpointing),* 308 NLRB 350, 355 (1992).

C. The Employer's Termination of Noweski

I find that the General Counsel has proven that Noweski's union activities was a motivating factor in the Employer's decision to terminate him. *Wright Line*, 251 NLRB 1083 (1980).

Thus, on June 24, Noweski's union activities became known to Broaddus through Granello, who advised Broaddus of several alleged improprieties by Noweski, including his misrepresentation of himself as the shop steward, his improperly obtaining first seniority, his maintenance of seniority on two jobs, spreading of work among all the employees, and blackballing other employees.

As set forth above, I have found that the Union unlawfully caused the Employer to terminate Noweski, and it did so on the next business day, June 27, following Granello's conversation with Broaddus.

Once a showing has been made that the employee's union activities were a motivating factor in his discharge, the burden shifts to the Employer to prove that it would have terminated

him even in the absence of his union activities. *Wright Line*, supra.

Broaddus gave several reasons for terminating Noweski. I cannot find that any are supported by the evidence. First, Broaddus stated that Noweski's employment references had not been completed, but it was conceded by him that at that time, all employees were working as their applications were being completed. Further, Wolfe conceded that employees were employed in that period of time whose documents were not received by the personnel office. There was no evidence that any one other than Noweski was discharged for that reason.

Broaddus further testified that Noweski was terminated because he refused to be a party to the alleged arrangement between Noweski and Burr whereby Noweski was called in ahead of the Union personnel in exchange for his agreement to help keep the union "riff raff" out of the terminal. First, Broaddus became aware of this alleged arrangement 1 week after he became terminal manager, approximately 1 month before Noweski's termination, but never brought it to the Employer's attention until the eve of trial. He also did not take any action against Noweski because of this alleged arrangement until his conversation with Granello on June 24. In addition, Noweski had been approved for placement on the seniority list before June 24. Further, there is no credible evidence that such an arrangement was made. There was evidence that Noweski spoke to Burr, and that he suggested to Broaddus that an employee may not be honest, but Broaddus insisted that Noweski played no part in Broaddus' decision as to who to work.

As to the above alleged improprieties, admittedly none of them were mentioned to Noweski at the time of his termination on June 27. The only matter raised with Noweski was that according to Noweski's credited testimony, Broaddus told him that he would not be worked until he heard from Granello that his union problems were resolved.

Broaddus also testified that he terminated Noweski because Noweski intimidated him with threats. The threats, understandably, were Noweski's upset at being discharged without legal cause, and notwithstanding his visit to Granello, and Granello's statement to him that he no longer had any union problems, he still would not be worked by Broaddus.

Noweski did not curse Broaddus. He stated that he would not be "fucked" by the Employer, and threatened to seek legal redress, and bring "heat" upon Broaddus. It cannot be found that Noweski improperly threatened Broaddus by saying that he would seek help at any agency he could. He was merely expressing his desire to obtain legal relief from his unlawful discharge. That Broaddus felt intimidated by Noweski's seeking legal help does not make Noweski's statement unlawful, or a cause for discharge. To hold otherwise would make it permissible for an employer to discharge an employee for asserting his right to seek governmental investigation of the employer's unlawful conduct in refusing to employ him.

In this connection, it is significant to note that Broaddus' refusal to work Noweski occurred at the morning shape on June 27, not upon Noweski's return from meeting with Granello. Thus, at the morning shape, Broaddus told Noweski that he could not work until his union problems were resolved. Accordingly, whether or not Noweski was insubordinate to Broaddus when he returned from his later meeting with Granello is irrelevant, since the refusal to select him for work occurred prior to that time.

Broaddus' explanation as to why he "blamed" his termination of Noweski on the Union is not credible. He stated that after June 27, he was contacted by Burr who accused him of taking action against Noweski, and suggested that Broaddus owed his job to him. Broaddus, feeling intimidated by Burr's comments, and seeking to shift the blame, told him that he (Broaddus) was not responsible, but that the Union was at fault for asserting that union problems had to be straightened out by Noweski.

Clearly, that the Union caused Noweski's discharge was not something that Broaddus created to shift the blame from himself, but as admitted by him, he told Noweski the same thing on June 27, prior to his meeting with Broaddus, and was in fact the reason for Noweski's discharge.

On the contrary, Noweski had no problems at work prior to June 27, and had even been used by Broaddus to train and evaluate other drivers. In addition, no decision had been made by Broaddus to discharge Noweski before Granello's intervention. *Bricklayers Local 6 (Key Waterproofing),* 268 NLRB 879, 883 (1984); *Electrical Workers IBEW Local 441,* 221 NLRB 214 (1975).

I accordingly find and conclude that the Employer has not established that it would have discharged Noweski in the absence of his union activities. *Wright Line*, supra.

D. The Alleged Denial of Seniority to Noweski

The complaint alleges that on September 12, the Union requested that the Employer deny seniority to Noweski, and that on the same date, the Employer did so.

Upon awarding Noweski 1 day's pay for work he did in training employees, he thereby achieved 30 days' work in a 90-day period, thus receiving entitlement to placement on the seniority list.

On September 12, upon Noweski's reinstatement to work, a question concerning his placement on the seniority list arose. Such placement was determined based upon who began work first. However, when asked for guidance as to placement by the Employer, Union Agent Ernie Soehl stated that Doyle should be placed first, and Noweski second because the Union "ordered in" Doyle, and not Noweski.

As discussed above, there has been no proof that such a factor, that one employee has seniority over another because he was referred by the Union, is a valid consideration. Soehl may be correct in stating that if an employee was ordered in by the Union and not put to work, he has a valid claim for pay for the day. However, that is not to say that the employee who was ordered in has a preference in employment and placement on a seniority list over one who obtained the job without the Union's referral.

I believe that such a preference would violate the Act as it rewards the person for his union activities. *Dairylea Cooperative, Inc*., 219 NLRB 656, 658 (1975). There is no contractual provision which requires that employees be obtained through the Union. The Union is only accorded an "equal opportunity" in providing employees. Accordingly, the Union had no right to insist upon a preference on the seniority list for those referred by it. *P.P.G. Industries, Inc*., 229 NLRB 713, 715 (1977), where, in the absence of an exclusive hiring hall, the union violated the Act by refusing to process grievances of employees who obtained jobs on their own, and not through the union; See *Teamsters Local 42 (Daly, Inc.),* 281 NLRB 974, 976 (1986); *Key Waterproofing,* supra, 268 NLRB at 884.

Rather, according to the evidence, the first position on the seniority list must go to the person who arrived first at the terminal, and was put to work first, and it is undisputed that Noweski was first. I accordingly find and conclude that the Union's placement of Noweski in the number two position on September 12 violated Section 8(b)(1)(A) and (2) of the Act.

The evidence establishes that the Employer acquiesced in this placement of Noweski as second on the seniority list. By doing so, the Employer knew that Noweski should have been first on the list since he arrived first at the terminal and was put to work first. Accordingly, the Employer abetted the Union's unlawful discrimination against Noweski, and was equally responsible for the unlawful conduct.

E. Deferral to Arbitration

In December 1995, prior to the opening of the hearing, the Employer and Union filed separate motions for summary judgment with the Board, seeking deferral of the complaint allegations to decisions which had been made by the arbitration committee, set forth above. Counsel for the General Counsel opposed the motions, asserting that deferral would be inappropriate. On February 21, 1996, the Board denied the motions, stating that they would more appropriately be resolved following a hearing before an administrative law judge. The motions were renewed at the hearing, and I reserved decision on them.

Thereafter, also prior to this hearing, the Union filed a motion for bifurcation, requesting that the administrative law judge first determine whether deferral was appropriate, and then decide whether an unfair labor practice had been committed. The General Counsel opposed that motion. On September 20, 1996, the motion was denied by the Associate Chief Administrative Law Judge.

As will be discussed infra, I deny the Motions for Summary Judgment.

In *Spielberg Mfg. Co*., 112 NLRB 1080, 1082 (1955), the Board stated that deferral to the award of an arbitrator is appropriate if the arbitration proceedings "appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act."

Here, the General Counsel argues that inasmuch as the interests of Noweski are in apparent conflict with the interests of the Employer and the Union, deferral is not appropriate. *Kansas Meat Packers*, 198 NLRB 543 (1972).

The Union argues, and I agree, that it attempted to insulate the grievance procedure from any influence that Granello might have over it, by assigning its agent, Soehl, to the preparation and presentation of the grievance.

However, although Soehl did meet with Noweski, and prepared certain documentation, his presentation to the arbitration committee was such that it made the apparent conflict very apparent. First, he was the person who assigned Noweski to the number 2 position on September 12, because he believed that a person referred by the Union has preference in hire to someone not referred by the Union. That position was repeated by Soehl in his written presentation to the committee which heard Noweski's grievance.

In addition, since McNamara also filed a grievance, Soehl supported his grievance too, and consistently argued the Union's position that McNamara was entitled to preference since he was ordered in by the Union.

Unfortunately, Soehl was placed in the unenviable position of attempting to support two inconsistent grievances. He could not endorse one fully without doing damage to the other. I appreciate that he presented the Union's position and asked the committee for guidance, but in presenting the Union's position, as the Union's representative, he in fact, advocated the argument the Union had previously made—that McNamara was entitled to preference since he was called in by the Union.

Noweski was in apparent conflict with the interests of the Employer, because he was discharged, and denied his proper seniority at the request of the Union, and because Wolfe mistakenly stated at the arbitration committee that the contract provides that the Union has the "first opportunity," and not merely an equal opportunity to provide applicants for hire.

I accordingly find and conclude that inasmuch as the interests of the Employer and Union are adverse to those of Noweski with respect to the issues in the arbitration proceeding, that deferral to the decision of that committee is inappropriate. *Amsted Industries*, 309 NLRB 860 fn. 3 (1992), *Regional Import Trucking Co*., 292 NLRB 206, 231 (1988).

CONCLUSIONS OF LAW

1. Respondent Nationsway Transport Service is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent Local 560, International Brotherhood of Teamsters, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By requesting the Respondent Employer to terminate its employee Gregory Noweski, for reasons other than the failure to tender uniformly required initiation fees and periodic dues, the Respondent Union has violated Section 8(b)(1)(A) and (2) of the Act.

4. By requesting the Respondent Employer to deny the proper seniority to its employee, Gregory Noweski for reasons other than the failure to tender uniformly required initiation fees and periodic dues, the Respondent Union has violated Section 8(b)(1)(A) and (2) of the Act.

5. By terminating employee Gregory Noweski pursuant to the Respondent Union's request, the Respondent Employer violated Section 8(a)(3) of the Act.

6. By denying employee Gregory Noweski his proper seniority pursuant to the Respondent Union's request, the Respondent Employer violated Section 8(a)(3) of the Act.

7. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, I find it necessary to order the Respondents to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Employer and the Union violated the Act by causing the termination of Noweski, and denying him his proper seniority, I shall recommend that the Employer be directed to offer Noweski immediate and full reinstatement to his former position of employment, and restore his proper seniority, together with all seniority and other rights and privileges enjoyed, and if there is no job available for him, to offer him a substantially equivalent job. The Employer and the Union shall, jointly and severally, make Noweski whole for any loss of earnings he may have suffered because of the discrimination against him, in the manner prescribed in *F. W. Woolworth Co.,* 90

NLRB 289 (1950), with interest computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

I shall also recommend that the Union be ordered to advise the Employer and Noweski, in writing, that it has no objection to Noweski's employment, or the restoration of his proper seniority. I shall also recommend that the Employer be directed to post appropriate notices directed to its employees and the Union post appropriate notices directed to its members.

I am aware that the Parsippany terminal was closed, and that Noweski has been employed in another terminal of the Employer. Any matters concerning reinstatement and seniority rights shall be considered in the compliance phase of this proceeding. The Employer shall post such notices in the terminal to which the Parsippany drivers were transferred, and at which Noweski is currently employed.

[Recommended Order omitted from publication.]